

# Decision Notice

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## **Decision 040/2016: Organisation S and the Scottish Ministers**

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### **Climate Challenge Fund and Sustaining Dunbar**

Reference No: 201501356

Decision Date: 18 February 2016



Scottish Information  
Commissioner

## Summary

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On 4 July 2014, Organisation S asked the Scottish Ministers (the Ministers) for information they held about the Climate Challenge Fund and Sustaining Dunbar.

The Ministers disclosed some information and withheld the remainder. During the Commissioner's investigation, they disclosed more information.

The Commissioner found that the Ministers initially failed to provide Organisation S with all of the information they were entitled to and were wrong to withhold some internal correspondence. The Commissioner also found that the Ministers had failed to respond to Organisation S' request within the statutory time limit.

However, the Commissioner was satisfied that, by the end of the investigation, the Ministers had identified all information falling within the scope of the request and that the Ministers were entitled to withhold some third party personal data and some internal correspondence.

The Commissioner requires the Ministers to disclose the information which was wrongly withheld.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) "environmental information") and (3) (definitions of "data protection principles" and "personal data") (Interpretation); 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2), (3) and (4)(e) (Exceptions from duty to make environmental information available); 11(2), (3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedules 1 (The data protection principles, Part 1: the principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 4 July 2014, Organisation S made a request for information to the Ministers. The information requested was:

### *Meetings*

- *All information confirming whether any meetings were held between officers or personnel of the Scottish Government, in particular; the Climate Challenge Fund; the Climate Challenge department; and the Climate Challenge & International Low Carbon Economy department (if different), and with officers or personnel, employed or otherwise, of Keep Scotland Beautiful in the last five years in relation to, or which contains reference to, Sustaining Dunbar including the date and purpose of each meeting and any information contained within the minutes and/or notes taken in relation to such meetings.*

### *Performance of Sustaining Dunbar*

- *All information contained within documents or records from the last five years of the Scottish Government, in particular: the Climate Challenge Fund; the Climate Challenge department; and the Climate Challenge & International Low Carbon Economy department (if different), regarding the performance or activities of Sustaining Dunbar.*
- *All information contained within documents or records from the last five years of the Scottish Government, in particular; the Climate Challenge Fund; the Climate Challenge department; and the Climate Challenge & International Low Carbon Economy department (if different), regarding communication with officers or personnel of Keep Scotland Beautiful relating to activities of Sustaining Dunbar.*

### *Complaints against Sustaining Dunbar*

- *All information contained within documents or records from the last five years regarding complaints about Sustaining Dunbar which have been received by or communicated to the Scottish Government, in particular to: the Climate Challenge Fund, the Climate Challenge department and the Climate Challenge & International Low Carbon Economy department (if different), for its consideration.*
- *All information contained within documents or records regarding any responses to complaints referred to above.*

### *Contact with Scottish Government re. Sustaining Dunbar*

- *All information contained within documents or records from the last five years regarding communications which Keep Scotland Beautiful has had with the Scottish Government, in particular those with: the Climate Challenge Fund; the Climate Challenge department; and the Climate Challenge & International Low Carbon Economy department (if different) relating to Sustaining Dunbar.*
2. The Ministers responded on 24 September 2014. The Ministers disclosed some information and withheld the remainder under regulations 10(4)(e) and 11(1) of the EIRs.
  3. On 18 November 2014, Organisation S wrote to the Ministers requesting a review of their decision on the basis that they had not disclosed all the information falling within scope of the request; the exemption in regulation 10(4)(e) did not apply, and the Ministers had not provided any information indicating that Organisation S' complaints had been investigated.
  4. The Ministers notified Organisation S of the outcome of their review on 3 February 2015. They confirmed the original decision and also relied upon regulation 11(2) of the EIRs to withhold a small amount of third party personal data.
  5. On 23 July 2015, Organisation S wrote to the Commissioner. Organisation S applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Organisation S stated they were dissatisfied with the outcome of the Ministers' review and reiterated the comments made in its request for review.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Organisation S made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
7. On 19 August 2015, the Ministers were notified in writing that Organisation S had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Organisation S. The Ministers provided the information on 2 September 2015 and the case was allocated to an investigating officer.
8. On 31 August 2015, the Ministers disclosed further information to Organisation S.
9. Discussion with Organisation S confirmed that the investigation would focus on the information withheld under regulations 10(4)(e) and 11(2) of the EIRs. Organisation S was informed that the Commissioner could not investigate the Ministers' decision to withhold the personal data of the applicant under regulation 11(1), as Organisation S had not asked the Ministers to review their decision to withhold information under this exception. Organisation S was advised to pursue this matter under the Data Protection Act 1998 (the DPA).
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions.
11. These questions focused on the searches they had conducted to identify information covered by the request and the exceptions they had relied upon to withhold the requested information. The Ministers responded on 6 November 2015.
12. The Ministers were asked whether any further information was held regarding any investigation into Organisation S' complaints. The Ministers were asked to contact the relevant individuals to check their records again for any information about the complaints. The Ministers responded to these questions and provided copies of relevant correspondence.

## Commissioner's analysis and findings

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13. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Organisation S and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### Application of the EIRs

14. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (and, in particular, paragraphs (a) and (c) of the definition of "environmental information"). The information relates substantially to the funding of an organisation whose aim is to promote cycling and reduce the effect of carbon-emitting vehicles on the environment. Organisation S has not disputed the Ministers' decision to handle the request under the EIRs and the Commissioner will consider the information solely in terms of the EIRs in what follows.

## **Was all relevant information identified, located and provided by the Ministers?**

15. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to the information held by an authority when it receives a request.
16. Organisation S considered that the Ministers held more information than they had identified and disclosed in their response. The Ministers submitted that they had provided all the information they held that fell within the scope of Organisation S' request and that they did not hold further information.

### *Searches carried out by the Ministers*

17. The Ministers provided the names of the officials whose records were searched, and the key words and timescale used in searching their electronic Records and Document Management (eRDM) system. They also provided screen shots of the records retrieved by the search.
18. The Ministers were confident that any information that fell within scope of the request would be held in the eRDM system. They confirmed that the Scottish Government officials who were known to have corresponded on the subject were asked to ensure that any information they held on their personal or laptop computers, whether on network resources such as an eRDM file, Word or Excel or in their e-mail account, was saved appropriately into the eRDM system.
19. The Ministers confirmed that all of the records that had been identified had been searched, but many were found to be out of scope of the request.
20. In some cases, the information within these documents indicated that further information might be held. The Ministers confirmed that they did not hold any additional information.
21. The Ministers were asked specific questions as to whether they held any further information regarding any investigation into Organisation S' complaints. The Ministers provided copies of the responses from officials who held information relating to this issue. Any information that was considered likely to fall within scope of the information request was reviewed, but the Ministers found that either the information already been provided in response to the request or it fell outside the period covered by the request.
22. Organisation S questioned the Ministers' comment in the initial response, that "*Disclosure of this type of information while the issues are still ongoing could lead to a reduction in the comprehensive and frankness of discussions in the future...*". Organisation S considered that this contradicted statements given by Scottish Government officials that the matter about which they had complained was considered to be closed. The Ministers confirmed that the matter had been closed and no further information was held. They confirmed that Organisation S' complaints had been investigated and officials were satisfied that there was no concern that grants provided to Sustaining Dunbar constituted unlawful state aid.
23. In total, the Ministers identified 14 documents (one with an attachment) containing information which fell within the scope of Organisation S' request. The Ministers withheld this information.

### *The Commissioner's finding*

24. Having considered all the relevant submissions, the Commissioner is satisfied that the Ministers have taken adequate and proportionate steps to establish the information they held which fell within the scope of Organisation S' request. She accepts, on the balance of

probabilities, that the Ministers have identified all of the information falling within scope of Organisation S' request, and that the Ministers do not hold any further information covered by the request.

25. In reaching this conclusion, the Commissioner has taken into account the following:
- the officials whose records were searched are the relevant individuals that are likely to hold the relevant information;
  - the Ministers have provided evidence of their searches, which appear to have been reasonable, proportionate and thorough, using search terms likely to identify any relevant information;
  - having read the information withheld and disclosed, it appears unlikely that any further information is held;
  - the Ministers have conducted further searches of their records at the Commissioner's request, but no further information has been identified.
26. Some information was disclosed to Organisation S after the Ministers issued their review response; in relation to this information, the Commissioner finds that the Ministers failed to comply with regulation 5(1) of the EIRs in responding to Organisation S' request, by failing to provide the information within the statutory timescale for response.

### **Information falling in scope**

27. Most of the information withheld by the Ministers was the personal data of the owners of Organisation S, and this is outwith the scope of the investigation. The information considered in this decision is found in documents 1, 4, 6 (last paragraph), 9 and 12 (covering email and second attachment, with the exception of the applicant's personal data).

### **Regulation 11(2) - personal data – document 1**

28. The Ministers disclosed a redacted version of document 1 to Organisation S and withheld information under regulation 11(2) of the EIRs.
29. In order for a Scottish public authority to rely on this exception, it must show (i) that the information is personal data for the purposes of the DPA, and (ii) that making it available would contravene at least one of the data protection principles laid down in the DPA. In this case, the Ministers argued that the first data protection principle would be contravened if the information was disclosed.

#### *Is the withheld information personal data?*

30. "Personal data" are defined in section 1(1) of the DPA as:
- “data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possessions of, the data controller”* (the full definition is set out in Appendix 1).
31. The Ministers stated that the name and contact details of a private individual had been withheld, together with the names of individuals who work for, are involved with, or on the board of Sustaining Dunbar. The Ministers considered that this information was the personal data of those individuals.
32. The Commissioner accepts that living individuals would be identified from this information. The information relates to the individuals in a biographical sense and is their personal data.

### *The first data protection principle*

33. The first data protection principle states that the processing of personal data (in this case, making those data publicly available in response to a request made under the EIRs) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and does not consider any of the withheld information to be sensitive personal data.
34. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be made available, it is likely that disclosure will also be fair and lawful.
35. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be made available. If any of these conditions can be met, she must then consider whether the disclosure of these personal data would also be fair and lawful.

### *Can any of the conditions in Schedule 2 to the DPA be met?*

36. The Ministers stated that they had not asked the named individuals if they would consent to disclosure, as, in most instances, they did not have their contact details. In relation to the individual whose contact details were withheld, the Ministers had not felt it necessary to seek his consent because, as a matter of policy, the Ministers would not divulge the names and contact details of private individuals.
37. The Commissioner has considered all the conditions in Schedule 2 and considers that condition 6 is the only one which might be relevant in this case. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (i.e. the individuals to whom the data relate). The processing in this case would be making the data available in response to Organisation S' request.
38. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
  - (i) Is Organisation S pursuing a legitimate interest or interests?
  - (ii) If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subjects?
  - (iii) Even if the processing is necessary for Organisation S' legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?

### *Is Organisation S pursuing a legitimate interest or interests?*

39. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual

properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In the Commissioner's published guidance<sup>1</sup> on regulation 11(2) of FOISA, it states:

*"In some cases, the legitimate interest might be personal to the applicant - e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety."*

40. The Ministers were unclear what Organisation S' legitimate interest was in the withheld information, and commented that Organisation S were likely to be aware of who the individuals were, from the descriptions in the information that had been released.
41. Organisation S stated that documents containing personal information may be relevant to how complaints regarding the transfer of public funds to third parties had been received and dealt with, and how that process has been monitored.
42. Organisation S considered that they had a considerable legitimate interest in the requested information as "its business had suffered direct harm from the activities of Sustaining Dunbar" and they had complained on numerous occasions to the funders of Sustaining Dunbar. Organisation S understood that no action had been taken, "on the basis of misleading or false statements that activities had either ceased or had proceeded with the consent of Organisation S". For Organisation S to be able to challenge these statements, they considered they needed to know the precise content of the statements and who made them.
43. The Commissioner considers that Organisation S has provided a persuasive explanation regarding its legitimate interests in the withheld information, and why full disclosure is required to meet those legitimate interests. It is possible that Organisation S already knows the names of the Sustaining Dunbar employees, board members and the other individual named in the withheld information. However, in this instance, after taking account of the background to the applicant's request, the Commissioner accepts that Organisation S is pursuing a legitimate interest in relation to the withheld information, in seeking to fully understand the complaints that have been made against Sustaining Dunbar.

*Is the processing necessary for the purposes of those legitimate interests?*

44. In all the circumstances of this case, the Commissioner can identify no viable means of meeting Organisation S' legitimate interests which would interfere less with the privacy of the data subjects than the provision of the withheld personal data. In the circumstances, she is satisfied that making those personal data available is necessary to meet the legitimate interests in question.

*Is the processing unwarranted in this case by reason of prejudice to the rights, freedoms or legitimate interests of the data subjects?*

45. The Commissioner must now consider whether the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the individuals concerned. This test involves a balancing exercise between the legitimate interests of Organisation S and the rights, freedoms and legitimate interests of the individuals in question. Only if the legitimate

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>



interests of Organisation S outweigh those of the individuals concerned can the information be made available without breaching the first data protection principle.

46. In the Commissioner's guidance on regulation 11 of the EIRs, she notes a number of factors which should be taken into account in carrying out the balancing exercise. These include:
- (i) whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
  - (ii) the potential harm or distress that may be caused by the disclosure
  - (iii) whether the individual objected to the disclosure
  - (iv) the reasonable expectations of the individuals as to whether the information should be disclosed.
47. The Ministers considered that there was no good reason to disclose the name and contact details of the private individual who had made a complaint. In relation to the other individuals, the Ministers considered that Organisation S' interests would not outweigh the individuals' interests in protecting their privacy, particularly given that allegations were being made against them and therefore release of their names in this context could tarnish their reputations in the local community.

#### *Name and contact details of private individual*

48. The Commissioner is satisfied that the personal data of the private individual is of a type that this individual would expect to be kept private. This person could have chosen to make their complaint public, but did not do so. The Commissioner is satisfied that the information relates to an individual's private life, and that its disclosure would be likely to cause harm or distress.
49. Having considered the competing interests in this particular case, the Commissioner finds that Organisation S' legitimate interests are outweighed by the prejudice to the rights and freedoms of the private individual that would result from disclosure. On balance, therefore, she must find that the requirements of condition 6 cannot be met here.
50. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the information. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently the Commissioner finds that disclosure of the information would breach the first data protection principle and that the information is therefore exempt from disclosure (and properly withheld) under regulation 11(2) of the EIRs.

#### *Names of Sustaining Dunbar's employees and board members*

51. In considering the legitimate interests of the Sustaining Dunbar employees who were named in the document, the Commissioner concludes that these employees would not have any expectation that their names would be made public in response to an information request.
52. In relation to the legitimate interests of the Sustaining Dunbar's board members, the Commissioner accepts that these individuals have a senior position and carry responsibility for the organisation, and it would therefore be more reasonable for them to have some expectation that their personal information might require to be disclosed. However, the information being withheld in this instance goes beyond general matters associated with their role. The Commissioner accepts that the disclosure of such information would be a

significant intrusion into matters which these individuals would reasonably expect to be kept private, even accepting the seniority of their positions within the organisation.

53. Having considered the competing interests, the Commissioner finds that Organisation S' legitimate interests are outweighed by the prejudice to the rights and freedoms of the Sustaining Dunbar's employees and board members that would result from disclosure. On balance, therefore, she must find that the requirements of condition 6 cannot be met here.
54. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the information. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently the Commissioner finds that disclosure of the information would breach the first data protection principle and that the information is therefore exempt from disclosure (and properly withheld) under regulation 11(2) of the EIRs.

**Regulation 10(4)(e) - Internal communications – documents 4, 6 (last paragraph), 9 and 12 (covering email and second attachment)**

55. The Ministers withheld the remaining information under regulation 10(4)(e) of the EIRs, as they considered it was internal communications between Scottish Government officials with regard to issues raised by Organisation S.
56. Under regulation 10(4)(e), a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception, it need only be established that the information is an internal communication. The exception in regulation 10(4)(e) covers all internal communications, regardless of their content or the level of harm that disclosure would be likely to cause.
57. In its application, Organisation S argued that the Scottish Government's correspondence with Keep Scotland Beautiful (KSB) could not be withheld under this exception, as it is an arms-length body and an independent charity. However, the Commissioner found that the withheld information does not contain any correspondence with KSB or other arms-length bodies. She accepts that the majority of the withheld information comprises internal communications between Scottish Government officials and is therefore subject to the exception in regulation 10(4)(e) of the EIRs.
58. Having considered the documents being withheld under this regulation, the Commissioner notes that one of documents is a letter from a third party to Organisation S (the second attachment to document 12). The Commissioner accepts that the exemption in regulation 10(4)(e) can apply to this information because it was transmitted within the Government as an attachment to an internal communication, and should therefore be regarded as an internal communication.
59. The Commissioner has concluded that all the withheld information comprises internal communications, and that the exception in regulation 10(4)(e) of the EIRs is engaged. She must now go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

*Public interest test*

60. The public interest test in regulation 10(1)(b) states that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public

interest in making the information available is outweighed by the public interest in maintaining the exception.

61. The Ministers acknowledged that there may be some public interest in disclosure of this information as part of open and transparent government, but considered that this had been met by disclosure of the majority of the information covered by the request. The Ministers considered that there is a much greater public interest in allowing a private space within which Scottish Government officials can freely and openly discuss options for responding to matters raised by members of the public and organisations, particularly when they include allegations about other organisations or sensitive issues.
62. In relation to documents 4 and 9, the Ministers argued that it is important that officials are able to have free and frank discussions internally, in this case to ensure that Organisation S did not have any grounds in relation to their allegations that Sustaining Dunbar was receiving unlawful state aid from the Scottish Government. The Ministers considered that disclosure of the information in these documents could lead to a reduction in the comprehensiveness and frankness of such advice in the future, or at least lead to advice not being recorded. They argued that this would not be in the public interest as it is important that policy officials are able to get this type of advice when considering concerns like those raised by Organisation S.
63. The Ministers submitted that the information withheld from the last paragraph of document 6 and the covering email of document 12 consisted of free and frank internal discussions. They argued that disclosure of this information would be unfair to the more junior officials involved. It would deter them from setting out similar concerns in future as it would be likely to damage their relationship with the applicant and might lead the applicant to target them with emails or phone calls in an unfair way. This would not be in the public interest.
64. Organisation S submitted that there was significant public interest in how public money is spent, particularly where this does not give rise to any commercial confidentiality issues. Organisation S stated that the following points all suggest that the public interest would favour the maximum level of transparency being applied in relation to this request:
  - The information requested relates to a large amount of public money being allocated to small groups of individuals, and seeks to uncover how the allocation of this money to said individuals has been administered and monitored, and whether this administration and monitoring has been appropriate. To the extent it has not been, the request is attempting to discover what failings have been made, to allow these to be addressed in future.
  - The information requested relates to how public bodies have handled specific allegations of harm to small businesses, of the falsification of statements in submissions for public funding awards, and of misleading statements being given to prejudice investigations into said complaints.
  - These complaints are numerous and relate to a range of serious conduct affecting not only Organisation S but a number of other small businesses. Organisation S considered it likely that the failure of administration, monitoring and complaints handling, and the failure to consider harm caused to small businesses, extends across Scotland.
  - Organisation S considered that the Scottish Government has repeatedly sought to hide behind the use of intermediaries in distributing public money to avoid accountability and

has fought every attempt to use freedom of information legislation to restore that accountability.

#### *Commissioner's findings*

65. Regulation 10(2) of the EIRs requires Scottish public authorities to interpret exceptions in a restrictive way, and to apply a presumption in favour of disclosure. The Commissioner also recognises that there is a public interest in ensuring that the Ministers are accountable and transparent in the actions taken and decisions they make, particularly in relation to the investigation of a complaint regarding the allocation and use of public funds.
66. The Commissioner accepts that the matters raised by Organisation S are of importance and concern to the businesses in the local area, and there is public interest in achieving maximum transparency in relation to the public funding of Sustaining Dunbar.
67. The Commissioner considers that the public interest arguments in favour of disclosure are strong, given that the matter under consideration was of serious concern, but, in relation to the majority of information under consideration at this point, the Commissioner considers that there is a stronger public interest in allowing Ministers and officials a private space to discuss such matters.
68. In reaching her conclusion, the Commissioner notes that the Ministers have disclosed a significant number of documents falling within scope of the request. The Commissioner considers that disclosure of this information goes a long way towards satisfying the public interest highlighted by Organisation S.

#### Documents 4 and 9

69. The Commissioner considers that the communications contained within documents 4 and 9 show officials communicating freely and frankly amongst themselves to obtain and discuss advice. The Commissioner accepts that it was in the public interest for officials to be able to discuss the allegations freely and frankly. She accepts that disclosure of this information would be likely to inhibit such free and frank discussion in future, which would not be in the public interest. On balance, the Commissioner finds that the public interest in maintaining the exception and withholding the information outweighs the public interest in disclosure.
70. Therefore, the Commissioner concludes that the Ministers were justified in withholding the information in documents 4 and 9 under the exception in regulation 10(4)(e) of the EIRs.

#### Documents 6 (last paragraph) and 12 (covering email and second attachment)

71. The Commissioner has reached a different conclusion with respect to the last paragraph of document 6 and the covering email and second attachment of document 12. She accepts that this information comprises internal communications, but she does not consider that it has the sensitivity of the information in documents 4 and 9. The information in the last paragraph of document 6 and the covering email and second attachment of document 12 (excluding the applicant's personal data) are not of the same descriptive nature or so closely associated with the process of seeking or giving advice.
72. The Commissioner has concluded that the public interest in making the information in documents 6 and 12 available is not outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, she considers the Ministers were not justified in withholding this information under the exception in regulation 10(4)(e) of the EIRs and requires it to be disclosed.

73. In summary, the Commissioner requires the Ministers to disclose the last paragraph of document 6 and the covering email and second attachment of document 12. (The Commissioner does not require disclosure of the signature on the second attachment to document 12.)

### **Failure to comply with timescales**

74. Regulation 5(2) of the EIRs allows Scottish public authorities a maximum of 20 working days after receipt of a request to comply with a request for information, subject to certain provisions which are not applicable in this case.
75. The Ministers explained that it took longer than expected to deal with the request because of the time required to identify the large volume of information covered by the request had been located and to check what could be released. The Ministers noted that they had sent a holding reply and apologised to Organisation S for the time taken to respond. The Ministers commented that Organisation S had submitted three significant requests, each with multiple questions, around the same time: considering and responding to these requests had placed a significant strain on a number of parts of the Scottish Government.
76. The Commissioner notes this explanation, but finds it is a matter of fact that the Ministers failed to respond to the request from Organisation S within 20 working days, and therefore failed to comply with regulation 5(2) of the EIRs in this respect.
77. The Commissioner has noted this failure but does not require the Ministers to take any action in relation to this breach in respect of this application.

## **Decision**

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The Commissioner finds that the Ministers partially complied with the EIRs in responding to the information request made by Organisation S.

In responding, the Ministers failed to disclose information covered by the request which was later provided to Organisation S, and therefore failed to comply with regulation 5(1) of the EIRs. The Ministers also failed to comply with the time limit for response in regulation 5(2) of the EIRs.

The Commissioner accepts that the Ministers correctly withheld information in document 1 under the exception in regulation 11(2) of the EIRs and correctly withheld information in documents 4 and 9 under the exception in regulation 10(4)(e). However, the Ministers wrongly withheld information from documents 6 and 12 under regulation 10(4)(e). The Commissioner requires the Ministers to disclose the information as described in paragraph 73 by **4 April 2016**.

## **Appeal**

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Should either Organisation S or the Scottish Ministers wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## **Enforcement**

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If the Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**18 February 2016**

## Appendix 1: Relevant statutory provisions

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### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

(3) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998], namely-

...

(b) "the data protection principles";

...

(d) "personal data".

...

#### 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

(b) is subject to regulations 6 to 12.

## **10 Exceptions from duty to make environmental information available–**

- (1) A Scottish public authority may refuse a request to make environmental information available if-
  - (a) there is an exception to disclosure under paragraphs (4) or (5); and
  - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
  - (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.
- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.
- (4) A Scottish public authority may refuse to make environmental information available to the extent that  
...
  - (e) the request involves making available internal communications.....

## **11 Personal data**

- ...
- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.
- (3) The first condition is-
  - (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations would contravene-
    - (i) any of the data protection principles; or
    - ...
  - (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded....



# Data Protection Act 1998

## 1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

## Schedule 1 – The data protection principles

### Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

### Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

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